FILE COPY

DEC 19 1934
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1934.

No. 531.

F. EUGENE NORTZ,

Claimant,

against

THE UNITED STATES,

Defendant.

BRIEF OF GRANDIN TRACY VOUGHT AS *AMICUS CURIAE.*

THE BALLOU PRESS NEW YORK

INDEX.

PAGE

CERTIFIED QUESTIONS 1

OUTLINE OF ARGUMENT 2

ARGUMENT 5

I. On the assumed facts, the petitioner, as owner of gold certificates, is entitled to receive a further sum from the United States..... 5

A. The United States has expropriated trust property belonging to the claimant without making payment of just compensation 5

B. Property in the nature of a contract was taken without payment of just compensation 15

C. The United States cancelled its contracts with claimant without making just compensation 17

D. Parallel cases clearly indicate that a further sum is due from the United States.. 19

II. An owner and holder of gold certificates described in the certified questions to whom redemption has been refused and who has been compelled to surrender said certificates may sue in the Court of Claims 30

A. The Court of Claims has jurisdiction of this case as an action for compensation for cancellation of contract 30

PAGE

B. The Court of Claims has jurisdiction of this as an action for compensation for expropriation of the certificates or the gold represented by the certificates..... 31

III. There was a taking of property within the meaning of the Fifth Amendment 33

A. Gold constituting trust property belonging to the claimant was taken by the United States 33

B. Property in the nature of a contract belonging to the claimant was taken by the United States 33

IV. Each certified question should be answered in the affirmative 33

Cases Cited.

PAGE

A. W. Duckett & Co., Inc. v. United States, 266 U. S. 149 32
Bank of Boston v. United States, 10 Ct. of Claims, 519, aff'd 96 U. S. 30 15
Brooks-Scanlon Corp. v. United States, 265 U. S. 106.. 14, 17, 23, 31
Grays Harbor Motor Ship Corp. v. United States, 45 Fed. (2d) 259 18
Horowitz v. United States, 267 U. S. 458.....4, 27
Ling Su Fan v. United States, 218 U. S. 302.....4, 28
Lynch v. United States, 292 U. S. 571.....13, 16
Magruder v. Drury, 235 U. S. 106..... 15
Monongahela Nav. Co. v. United States, 148 U. S. 312.. 10, 19, 27
Nitro-Powder Co. v. United States, 71 Ct. of Claims, 369 18
Olsen v. United States, 292 U. S. 246..... 9
Omnia Company v. United States, 261 U. S. 502..... 17
Phelps v. United States, 274 U. S. 341..... 14
Russell Motor Car Co. v. United States, 261 U. S. 514..18, 30
Russian Vol. Fleet vs. United States, 282 U. S. 481..... 32
Seaboard Air Line Ry. v. United States, 261 U. S. 299.. 24
Shoemaker v. United States, 147 U. S. 282..... 19
Sinking-Fund Cases, 99 U. S. 700..... 13
State National Bank of Boston v. United States, 24 Ct. of Claims, 488 16
United States v. Cress, 243 U. S. 316..... 25
United States v. Great Falls Mfg. Co., 112 U. S. 645... 31
United States v. Lynah, 188 U. S. 445.....20, 26
United States v. New River Collieries Co., 262 U. S. 341. 22
United States v. North American Co., 253 U. S. 330.... 24
United States v. Pacific R. R., 120 U. S. 227..... 24
United States v. Russell, 13 Wallace, 623..... 21
Wheeling Steel Corp. v. United States, 71 Ct. of Claims, 571 19

Statutes and Official Documents Cited.

PAGE

Act of March 3, 1863 ..... 7, 34
Act of July 12, 1882 ..... 7, 34
Act of March 14, 1900 ..... 7, 35
Act of March 2, 1903 28
Act of March 4, 1907 ..... 7, 35
Act of March 2, 1911 ..... 7, 36
Act of June 15, 1917 18
Gold Reserve Act of 1934 15
Fifth Amendment of United States Constitution.....
2, 3, 4, 8, 13, 16, 20, 24, 25, 26, 33
National Banking Emergency Relief Act of March 9, 1933 ..... 2, 3, 9, 17, 19
Economy Act of March 20, 1933 13
Lever Act 22
Report of Secretary of Treasury (1900-1933)..... 8
Report of Treasurer of the United States (1930)..... 7
Secretary of the Treasury Order of December 28, 1933..
2, 3, 9, 17, 19
United States Code, Title 31 § 429 ..... 5, 6, 7
United States Code, Title 31 § 428 ..... 6, 7
United States Code § 250 (Judicial Code 145) 30

Supreme Court of the United States

No. 531.

F. EUGENE NORTZ, Claimant,

against

THE UNITED STATES, Defendant.

BRIEF OF *AMICUS CURIAE.*

This is a hearing upon questions certified by the Court of Claims concerning a petition which seeks judgment against the United States for $64,334.07 as an unpaid balance due for certain gold certificates, Series of 1928, formerly owned and held by the claimant.

Questions Certified to This Court.

The Court of Claims certified to this Court the following three questions concerning which instructions are desired:

> 1. Is an owner of gold certificates of the United States, Series of 1928, not holding a federal license to acquire or hold gold coins or gold certificates, who, on January 17, 1934, had surrendered his certificates to the Secretary of the United States* under protest and had received therefor legal tender currency of equivalent face amount, entitled to receive from the United States a further sum, inasmuch as the weight of a gold dollar was 25.8 grains, .9 fine, and the market price thereof on January 17, 1934 was in excess of the currency so received?

* So in original.

2. Is a gold certificate, Series of 1928, under the facts stated in question 1, an express contract of the United States in its corporate or proprietary capacity, which will enable its owner and holder to bring suit thereon in the Court of Claims?

3. Do the provisions of the Emergency Banking Act of March 9, 1933 and the order of the Secretary of the Treasury, dated December 28, 1933, requiring the plaintiff as owner of gold certificates, as stated in question 1, to deliver the same to the Treasury of the United States in exchange for currency of an equivalent amount not redeemable in gold, amount to a taking of property within the meaning of the Fifth Amendment to the Constitution of the United States?

OUTLINE OF ARGUMENT.

I.

On the assumed facts, the petitioner, as owner of gold certificates, is entitled to receive a further sum from the United States.

A. The United States has expropriated trust property belonging to the claimant without making payment of just compensation.

1. The gold certificates held by petitioner were "trust receipts" issued by the United States.

2. The United States' refusal to redeem the certificates and the requirement of surrender of the certificates constituted an expropriation of the trust res.

3. The value of the trust res expropriated was in excess of the compensation provided for and paid.

B. Property in the nature of a contract was taken without payment of just compensation.

1. The gold certificates were contracts between the claimant and the United States for the payment of gold coin.

2. A contract is property within the provisions of the Fifth Amendment.

3. The expropriation under the National Banking Emergency Relief Act of March 9, 1933 and the Secretary's order of December 28, 1933 constituted a taking of the contract.

4. The compensation provided for in and paid under the National Banking Emergency Relief Act of March 9, 1933 and the order of December 28, 1933 was not equivalent to the value of the contract expropriated.

C. The United States cancelled its contracts with claimant without making just compensation.

1. The gold certificates were contracts between the claimant and the United States for the payment of gold coin.

2. The refusal to redeem the gold certificates and the requirement that they be surrendered to the United States constituted a cancellation of contract.

3. The amount of remuneration provided for in and paid under the National Banking Emergency Relief Act of March 9, 1933 and the order of December 28, 1933 was not just compensation.

D. Parallel cases clearly indicate that a further sum is due from the United States.

1. Cases arising out of legislative and executive acts in exercising the war power and the power of regulating

interstate commerce hold that all private property taken in the exercise of such power or powers must be compensated for at the market value at the time of taking.

2. *Horowitz* v. *United States*, 267 U. S. 458, is not in point.

3. *Ling Su Fan* v. *United States*, 218 U. S. 302, is not in point.

II.

An owner and holder of gold certificates described in the certified questions, to whom redemption has been refused and who has been compelled to surrender said certificates, may sue in the Court of Claims.

A. The Court of Claims has jurisdiction of this case as an action for compensation for cancellation of contract.

B. The Court of Claims has jurisdiction of this case as an action for compensation for expropriation of the certificates, or the gold represented by the certificates.

III.

There was a taking of property within the meaning of the Fifth Amendment.

A. Gold constituting trust property belonging to claimant was taken by the United States (See I, A, *supra*).

B. Property in the nature of a contract belonging to the claimant was taken by the United States (See I, B, *supra*).

IV.

Each certified question should be answered in the affirmative.

ARGUMENT.

I.

On the assumed facts, the petitioner, as owner of gold certificates, is entitled to receive a further sum from the United States.

A. The United States Has Expropriated Trust Property Belonging to the Claimant Without Making Payment of Just Compensation.

1. *The gold certificates held by petitioner were "trust receipts" issued by the United States.*

Each of the gold certificates in question was issued under § 429 of Title 31 of the United States Code. Each recited the following:

> "This certifies that there have been deposited in the Treasury of
>
> THE UNITED STATES OF AMERICA
>
> ONE THOUSAND DOLLARS
>
> in gold coin payable to the bearer on demand."

The United States Code, Title 31, Section 429, provides:

> "* * * and the coin so deposited shall be retained in the Treasury and held for the payment of such certificates on demand, and used for no other purpose."

Thus the gold coin underlying these certificates was held specifically for their redemption and for no other purpose.

Any title of the United States to such gold coin was a trustee title with no beneficial interest therein in the United States. The gold coin was held on special deposit for a specific purpose. It follows that the gold certificates were trust receipts.

In the argument before the Court of Claims and the briefs submitted to the Court of Claims, counsel for the Government incorrectly placed great emphasis upon the last sentence of Section 428 as showing that the gold certificates were not trust receipts. Section 428 has no application whatever to these gold certificates issued under Section 429. Section 428 deals principally with issuance of gold certificates in exchange for gold bullion, and the last sentence thereof provides:

> "And certificates representing coin in the Treasury may be issued in payment of interest on the public debt, which certificates, together with those issued for coin and bullion deposited, shall not at any time exceed 20 per centum beyond the amount of coin and bullion in the Treasury."

This sentence is not a permission to issue 20 per cent more certificates than there are gold coins deposited for issuance of certificates. It is a permission to issue certain certificates in payment of interest upon the public debt. Further, it is a measure of and a limitation on the amount of certificates that can be issued in payment of interest on the public debt, under Section 428. It does not affect the amount or nature of the gold coin certificates issuable under Section 429—a section adopted years later.

Section 429 and not Section 428 deals with the issuance of gold certificates against deposits of gold coin. The language contained in Section 429 is susceptible only of the interpretation that the coins so deposited shall be retained in trust by the Treasury for the purpose of payment of the gold certificates issued against such coin and used for no other purpose.

The history of Sections 428 and 429 of United States Code (See Appendix A) clearly demonstrates that the last sen-

tence of Section 428 has no reference whatever to the gold certificates involved herein.

Section 5 of the act of March 3, 1863, is the original source of what is now Section 428. Section 12 of the act of July 12, 1882 is the original source of what is now Section 429. In so far as it related to the issuance of gold certificates against the deposit of gold coin, the act of March 3, 1863 was superseded by Section 12 of the act of July 12, 1882, and by Section 6 of the act of March 4, 1900, which was reenacted by the act of March 4, 1907 and again by the act of March 2, 1911.

The only certificates that were ever issued under the authority of the act of March 3, 1863, were issued between the dates November 15, 1865 and January 1, 1875 (see Report of the Treasurer of the United States, 1930, contained in Annual Report of the Secretary of the Treasury, 1930, p. 659). No other gold certificates were issued until after the passage of the act of July 12, 1882 (Annual Report of the Secretary of the Treasury, 1930, p. 660). The Treasurer in the report above referred to on page 660 further stated, "All issues of gold certificates at the present time are made under authority of the act of March 14, 1900 as amended". This act as amended is the present Section 429.

The trust relationship established by these statutory provisions and the gold certificates issued pursuant thereto has been recognized by the United States. The Secretary of the Treasury in his annual report for the year ending June 30, 1930, on page 29, set out the amount of gold coin and bullion and silver dollars held against outstanding gold and silver certificates and Treasury notes of 1890. In said report he captioned his discussion relative to this matter, "the Currency Trust Fund". In the tables contained on pages 604 and 607 of said report of 1930, the Secretary reported certain gold coin and bullion and silver dollars which, he stated, were "held in trust against gold and silver certificates (and Treasury notes of 1890)". On page 375 of the annual re-

port of the Secretary of the Treasury for the year June 30, 1933, the Secretary reported certain gold coin and bullion and silver dollars "held in trust against the gold and silver certificates (and Treasury notes of 1890)". In each of the annual reports of the Secretary of the Treasury from 1900 through 1933, there is a similar description of the nature of the gold certificates and the report for the year 1926 contains the following at page 80:

> "Gold and silver certificates certify on their faces, respectively, that 'there has been deposited in the Treasury of the United States of America dollars in gold (or standard silver dollars) payable to bearer on demand.' Gold and silver certificates are in fact mere 'warehouse receipts' issued by the Government in exchange for gold coin or bullion deposited in the one case, or standard silver dollars, respectively, withdrawn from the general funds of the Treasury."

2. *The United States' refusal to redeem the certificates and the requirement of surrender of the certificates constituted an expropriation of the trust res.*

The United States, as trustee in possession of trust property held for the holders of the certificates, by refusal to deliver gold coin upon demand to the certificate holders and by taking over the gold coin underlying the certificates expropriated the trust res. Admitting for this purpose that such action was justifiable as a valid exercise of the power to regulate coin and currency, nevertheless, the United States thereby obligated itself to pay just compensation for the property taken, pursuant to the requirement of the Fifth Amendment as follows:

> "Nor shall private property be taken for public use without just compensation."

3. *The value of the trust res expropriated was in excess of the compensation provided for* and paid.*

It is admitted by the demurrer to the petition and in certified question number 1 that the value of the gold represented by the certificates and expropriated by the Government under the National Banking Emergency Relief Act of March 9, 1933 and the order of the Secretary dated December 28, 1933 was in excess of the compensation provided for and paid to the holder.

Mr. Justice Roberts, who rendered the opinion for this Court in the recent case of *Olsen* v. *United States,* 292 U. S. 246 (1934), defined "just compensation" as follows, at pages 254 and 255:

> "The rule prescribed by the Minnesota constitution is not, at least so far as concerns these cases, to be distinguished from that expressed by the just compensation clause of the Fifth Amendment and implied in the due process clause of the Fourteenth Amendment to the Federal Constitution. The judicial ascertainment of the amount that shall be paid to the owner of private property taken for public use through exertion of the sovereign power of eminent domain is always a matter of importance for, as said in *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 324; 'In any society the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.' The statement in that opinion (p. 326) that 'no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner' aptly expresses the scope of the constitutional safeguard against the uncompensated taking or use of private property for public purposes. *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362, 399.

---

* Unless this Court should construe "equivalent amount" contained in the National Banking Emergency Relief Act of March 9, 1933, to mean "equivalent" in value, in which case, the statute has been applied in an unconstitutional manner by the Executive branch of the government.

"That equivalent is the market value of the property at the time of the taking contemporaneously paid in money. *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299, 306. *Jacobs* v. *United States*, 290 U. S. 13, 17. 2 Lewis, Eminent Domain, 3d Ed. § 682, p. 1172. It may be more or less than the owner's investment. He may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price. Its value may have changed substantially while held by him. The return yielded may have been greater or less than interest, taxes and other carrying charges. The public may not by any means confiscate the benefits, or be required to bear the burden of the owner's bargain. *Vogelstein & Co.* v. *United States*, 262 U. S. 337, 340. He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more. It is the property and not the cost of it that is safeguarded by state and federal constitutions. *Minnesota Rate Cases*, 230 U. S. 352, 454."

In *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312, the United States, in its regulation and control of interstate commerce, condemned certain property belonging to the claimant by an exercise of the power of eminent domain. Representatives of the Government refused to give compensation to the claimant except in the manner and amount specified by the legislation authorizing the condemnation of the property.

This Court sustained the power of the Federal Government to condemn the property, but held that a necessary incident to the exercise of this power was the right of the property holder to receive just compensation therefor and to have the amount of compensation determined judicially—not by Congress. Mr. Justice Brewer discussed this point as follows (pp. 324-328):

"In the case of *Sinnickson* v. *Johnson*, 17 N. J. L. (2 Harr.) 129, 145, cited in the case of *Pumpelly* v. *Green Bay Company*, 13 Wall. 166, 178, it was said that 'this power to take private property reaches back of all con-

stitutional provisions; and it seems to have been considered a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle.' And in *Gardner* v. *Newburgh,* 2 Johns. Ch. 162, Chancellor Kent affirmed substantially the same doctrine. And in this there is a natural equity which commends it to every one. It in no wise detracts from the power of the public to take whatever may be necessary for its uses; while, on the other hand, it prevents, the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

"But we need not have recourse to this natural equity, nor is it necessary to look through the Constitution to the affirmations lying behind it in the Declaration of Independence, for, in this Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses. * * *

"The language used in the Fifth Amendment in respect to this matter is happily chosen. The entire amendment is a series of negations, denials of right or power in the government, the last, the one in point here, being, 'Nor shall private property be taken for public use without just compensation.' The noun 'compensation', standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective 'just'. There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken * * *.

"By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the Legislature, its representative, to say when compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry. In *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420, 571, Mr. Justice McLean in his opinion referring to a provision for compensation found in the charter of the Warren bridge, uses this language: 'They (the legislature) provide that the new company shall pay annually to the college, in behalf of the old one, one hundred pounds. By this provision, it appears that the legislature has undertaken to do what a jury of the country only could constitutionally do: assess the amount of compensation to which the complainants are entitled.' See also the following authorities: *Commonwealth* v. *Pittsburgh & Connellsville Railroad* 58 Penn. St. 26, 50; *Penn. Railroad* v. *Balt. & Ohio Railroad,* 60 Maryland, 263; *Isom* v. *Mississippi Central Railroad,* 36 Mississippi, 300.

"In the last of these cases, and on page 315, will be found these observations of the court: 'The right of the legislature of the State, by law, to apply the property of the citizen to the public use, and then to constitute itself the judge in its own case, to determine what is the 'just compensation' it ought to pay therefor, or how much benefit it has conferred upon the citizen by thus taking his property without his consent, or to extinguish any part of such 'compensation' by prospective conjectural advantage, or *in any manner* to interfere with the just powers and province of courts and juries in administering right and justice, cannot for a moment be admitted or tolerated under our Constitution. If anything *can be* clear and undeniable, upon principles of natural justice or constitutional law, it seems that this must be so.'"

Chief Justice Waite, who wrote the opinion of the United States Supreme Court in the *Sinking-Fund cases*, 99 U. S. 700, stated at page 719:

> "They cannot legislate back to themselves without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the term of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

Lynch v. *United States*, 292 U. S. 571 (June 1934), involved the constitutionality of the Act of March 20, 1933, commonly called the Economy Act, whereby the United States sought to avoid any liability on certain war risk insurance policies previously issued by it. This Court sustained the plaintiff's contention that Congress was forbidden by the Fifth Amendment of the Constitution to repudiate the insurance agreement. Mr. Justice Brandeis, at page 579, said:

> "Second. The Fifth Amendment commands that property b not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. *United States* v. *Central Pacific R. Co.*, 118 U. S. 235, 238; *United States* v. *Northern Pacific Ry. Co.*, 256 U. S. 51, 64, 67. When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. That the contracts of war

> risk insurance were valid when made is not questioned. As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power."

The Court rejected the Government's contention that the existing emergency necessitated economy to such an extent that the attempted repudiation by the United States of its contracts was justifiable. Mr. Justice Brandeis at page 580 said:

> "In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. 'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or municipality or a citizen.' (*Sinking-Fund Cases,* 99 U. S. 700, 719.)"

Mr. Justice Butler in *Brooks-Scanlon Corporation* v. *United States,* 265 U. S. 106 (*infra* p. 23) discussed "just compensation" at page 125:

> "Determination of just compensation is to be based on the fact that claimant's contract and its rights and interest thereunder were expropriated, and that it is entitled to have their value at the time of the taking."

Accord: The language of Mr. Justice Butler in *Phelps* v. *United States,* 274 U. S. 341 (1927) at page 344:

> "The Government's obligation is to put the owners in as good position pecuniarily as if the use of their prop-

erty had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking. As such payment has not been made, petitioner is entitled to the additional amount claimed. *Seaboard Air Line Ry.* v. *United States,* supra, 304; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123; *Liggett and Myers Tobacco Co.* v. *United States,* ante, p. 215."

In a radio address on or about August 28, 1934, the Secretary of the Treasury announced that the United States had made a profit of $2,800,000,000 by the devaluation of the gold dollar under the Gold Reserve Act of 1934. Had the United States paid the full value of the gold coin and the gold certificates at the times of their taking, this "profit" would not have existed. The "profit" arises only because the United States holding property in trust expropriated it without making just compensation. "It is a well settled rule that a trustee can make no profit out of his trust." *Magruder* v. *Drury,* 235 U. S. 106 at page 119.

B. Property in the Nature of a Contract Was Taken Without Payment of Just Compensation.

1. *The Gold Certificates were contracts between the claimant and the United States for the payment of gold coin.*

That each certificate constituted a contract between claimant and United States for the payment of gold coin is established.

In *Bank of Boston* v. *United States,* 10 Court of Claims 519; aff'd, 96 U. S. 30, the claimant therein, the owner of certain gold certificates, tendered the same for redemption. Said certificates were cancelled by the defendant without delivery to the plaintiff of the gold provided for in such certificates. Claimant thereupon sued to recover gold coin equivalent to the nominal value of the certificates tendered by it. The case was considerably complicated by the question of

who was liable for the fraud of an employee of the United States Government in the cancellation of the certificates, but decision was rendered in favor of the claimant and judgment was entered for payment to the claimant of the face amount of the certificates, payable in gold.

Mr. Justice Drake of the Court of Claims discussed the relationship between the holder of a certificate and the United States Government as follows (pp. 544, 545):

> "* * * for when Smith deposited them in the subtreasury, the claimant ceased to have any property in the particular certificates deposited, and in lieu thereof stood the obligation of the Government to pay the claimant the amount of those certificates in gold coin; which obligation is to this day unfulfilled."

This relationship was further discussed by Judge Nott in his concurring opinion (p. 546):

> "But the gold-certificates themselves formed an express contract; and the covenant of the United States, as evidenced by that contract, was to pay what the cashier of the State Bank in fact came to receive—gold coin. He performed the only obligation cast upon the bank, that of presenting the certificates for payment; and the Government is bound to perform the remaining obligation cast upon it, that of paying the coin, unless it can show a stronger title or superior equity."

Accord:

State National Bank of Boston v. *United States*, 24 Court of Claims 488.

2. *A Contract is property within the provision of the Fifth Amendment.*

Contracts are property within the provision of the Fifth Amendment, *Lynch* v. *United States*, 292 U. S. 571 (*supra*, p. 13), wherein Mr. Justice Brandeis said (p. 579):

> "Valid contracts are property, whether the obligor be a private individual, a municipality, a state or the United States."

Accord:

Brooks-Scanlon Corporation v. *United States*, 265 U. S. 106 (*infra*, p. 23);
Omnia Co. v. *United States*, 261 U. S. 502.

3. *The expropriation under the National Banking Emergency Relief Act of March 9, 1933 and the Secretary's order of December 28, 1933 constituted a taking of the contract.*

Claimant delivered the certificates to the United States under protest and received at the time $106,300 face amount of currency which was not redeemable in gold and which was admittedly of less value than the gold represented by the certificates so surrendered. The surrender was made in order to avoid the penalties imposed by the laws, regulations, proclamations and orders applicable. Such a surrender was in no sense voluntary but was due to legislative duress, and thus constituted a taking.

4. *The compensation provided for in and paid under the National Banking Emergency Relief Act of March 9, 1933 and the order of December 28, 1933 was not equivalent to the value of the contract expropriated.*

See discussion under I-A-3, *supra*, page 9.

C. The United States Cancelled Its Contracts With Claimant Without Making Just Compensation.

1. *The gold certificates were contracts between the claimant and the United States for the payment of gold coin.*

See Discussion *supra*, I-B-1 (p. 15).

2. *The refusal to redeem the gold certificates and the requirement that they be surrendered to the United States constituted a cancellation of contract.*

Admitting for this purpose that the refusal by the United States to honor the demand was based upon an exercise of

some paramount power of the Government, it was nonetheless a cancellation of the agreement, and placed upon the United States the obligation to pay just compensation.

Russell Motor Car Co. v. *United States,* 261 U. S. 514 (appealed from Court of Claims 1923).

This was a consolidation of three appeals from judgments of the Court of Claims fixing compensation for the cancellation of claimant's contracts with the government. In the first and third cases the contracts for the manufacture of anti-air craft gun carriages and brass shell cases were entered into through the Navy Department and were canceled by the Secretary of the Navy, by authority delegated under the Act of June 15, 1917. In the second case, the contract was with the Emergency Fleet Corporation, for the construction of barges, and was canceled through that agency under like authority.

The Court of Claims received evidence as to the value of the contracts on the date of cancellation and made its award on that basis. The Supreme Court, in affirming the judgments of the Court of Claims, through Mr. Justice Sutherland, said (p. 523):

> "In fixing just compensation the court must consider the value of the contract at the time of its cancellation, not what it would have produced by way of profits for the Car Company if it had been fully performed."

The Court of Claims held in *Nitro-Powder Co.* v. *United States,* 71 Court of Claims, 369 (1930) on the authority of *Russell Motor Car Co.* v. *United States,* 261 U. S. 514, that the compensation to which the claimant was entitled was the value of the contract at the time it was canceled.

In *Grays Harbor Motor Ship Corp.* v. *United States,* 45 Fed. (2d) 259 (Court of Claims Dec. 1930), it was held that just compensation for cancellation of Government shipbuilding contracts required payment of an amount representing the total loss as of the time of cancellation.

Accord:

Wheeling Steel Corp. v. *United States,* 71 Court of Claims 571 (1931).

3. *The amount of remuneration provided for in and paid under the National Banking Emergency Relief Act of March 9, 1933, and the order of December 28, 1933, was not just compensation.*

See discussion under I-A-3, *supra* (p. 9).

D. Parallel Cases Clearly Indicate That a Further Sum Is Due From the United States.

1. *Cases arising out of legislative and executive Acts in exercising the war power and the power of regulating interstate commerce hold that all private property taken in the exercise of such power or powers must be compensated for at the market value at the time of taking.*

Whenever private property is taken for public use, it is the duty of the Courts to determine (1) whether or not the property is taken for a public use and (2) the amount of just compensation which should be paid therefor.

Shoemaker v. *United States,* 147 U. S. 282 (1892), wherein Mr. Justice Shiras at page 298 said:

> "The adjudicated cases likewise establish the proposition that while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made."

Monongahela Navigation Co. v. *United States,* 148 U. S. 312, *supra,* page 10, wherein Mr. Justice Brewer said (p. 327):

"By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."

Regardless of what power is exercised by the government in the taking of private property, the owner and holder of such property is guaranteed payment of just compensation by virtue of the Fifth Amendment.

Mr. Justice Brewer in his opinion for this Court in *United States* v. *Lynah*, 188 U. S. 445 (*infra*, p. 26), said (p. 464):

"The rule deducible from these cases is that when the government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates. * * * All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The government may take personal or real property whenever its necessities or the exigencies of the occasion demand. So the contention that the government had a paramount right to appropriate this property may be conceded, but the Constitution in the Fifth Amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation.

"The government may take real estate for a postoffice, a court house, a fortification or a highway; or in time of war it may take merchant vessels and make them part of its naval force. But can this be done without an obligation to pay for the value of that which is so taken and appropriated? Wherever in the exercise of its gov-

> ernmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others."

When private property is taken to facilitate an exercise of the war power, just compensation must be made to the former owner and holder of the property so taken.

An early statement of this rule was made by Mr. Justice Clifford for this Court in *United States* v. *Russell*, 13 Wallace 623 (1871), as follows (p. 627):

> "Unquestionably such extreme cases may arise, as where the property taken is imperatively necessary in time of war to construct defences for the preservation of a military post at the moment of an impending attack by the enemy, or for food or medicine for a sick and famishing army utterly destitute and without other means of such supplies, or to transport troops, munitions of war, or clothing to reinforce or supply an army in a distant field, where the necessity for such reinforcement or supplies is extreme and imperative, to enable those in command of the post to maintain their position or to repel an impending attack, provided it appears that other means of transportation could not be obtained, and that the transports impressed for the purpose were imperatively required for such immediate use. Where such an extraordinary and unforseen emergency occurs in the public service in time of war no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent of the immediate public exigency, but the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay or a resort to any other source of supply, and the circumstances must be such as imperatively require the exercise of that extreme power in respect to the particular property so impressed, appropriated, or destroyed. Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be

> justified. Such a justification may be shown, and when shown the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner."

United States v. *New River Collieries Co.*, 262 U. S. 341 (1923), was an action to recover a balance alleged to be due as compensation for coal requisitioned by the United States under Section 10 of the Lever Act.

Between September 1919 and February 1921, the United States requistioned from the New River Collieries Company approximately 60,000 tons of coal for the use of the Navy. The President, acting through the Navy Department under the terms of the Lever Act, fixed the price paid as compensation. Such price was unsatisfactory to the owner who sued in the United States District Court for a sum which it considered would constitute just compensation.

The Lever Act, among other things, authorized the President to fix domestic prices, prevent hoarding of basic commodities and requisition basic commodities for the purpose of supplying the Army and Navy.

The Government, during the trial, attempted to have just compensation fixed on the basis of the domestic price or on the basis of a "real" value. The claimant, however, introduced evidence of export market prices over the objection of the Government. This Court held that the introduction of evidence of export market prices was proper and that the value of the coal in the export market should be considered as the correct figure for determining just compensation for the talking of the property.

On pages 343, 345, Mr. Justice Butler discussed the point as follows:

> "The United States contends that the court erred in refusing, under the circumstances disclosed, to allow it to introduce evidence of the 'real' value of the coal as distinguished from its market value, and in holding that spot export prices controlled in determining just compensation; and further that, even if such market prices

are taken, it was error to exclude evidence of domestic prices.

"Section 10 of the Lever Act in obedience to the Fifth Amendment provides for just compensation. The war or the conditions which followed it did not suspend or affect these provisions. United States v. Cohen Grocery Co., 255 U. S. 81, 88. The owner was entitled to the full money equivalent of the property taken, and thereby to be put in as good position pecuniarily as it would have occupied if its property had not been taken. Seaboard Air Line Ry. Co. v. United States, 261 U. S. 299, and cases cited. The ascertainment of compensation is a judicial function, and no power exists in any other department of the Government to declare what the compensation shall be or to prescribe any binding rule in that regard. Monongahela Navigation Co. v. United States, 148 U. S. 312, 327. Where private property is taken for public use, and there is a market price prevailing at the time and place as of the taking, that price is just compensation. * * *

"Nor was it error to exclude evidence of the market prices of coal for domestic use, and to hold that market prices for export coal controlled. The owner cannot be required to suffer pecuniary loss. Upon an examination of the record we agree with the statement of the Circuit Court of Appeals (276 Fed. 690, 691) that if the coal had not been taken by the United States, it could have been sold at the market price for export coal prevailing for spot deliveries at the time of the taking.

"The owner was entitled to what it lost by the taking. That loss is measured by the money equivalent of the coal requisitioned. It is shown by the evidence that every day representatives of foreign firms were purchasing, or trying to purchase, export coal. Transactions were numerous and large quantities were sold. Export prices for spot coal were controlled by the supply and demand. These facts indicate a free market. The owner had a right to sell in that market, and it is clear that it could have obtained the prices there prevailing for export coal."

Brooks-Scanlon Corporation v. *United States*, 265 U. S. 106 (1924). The claimant, Brooks-Scanlon Corporation,

prior to the entry of the United States into the world war, had contracted with a shipbuilder in New Jersey for the building of a ship. After certain payments on account had been made by the claimant, the United States, following its entrance into the war, expropriated the contract. Claimant recognizing that the Federal Government could expropriate the contract claimed that under the Fifth Amendment the Government must pay just compensation therefor.

The cost of shipbuilding had greatly increased between the date of the making of the contract and the time of its expropriation by the Government. For this reason the part-payments previously made by the claimant did not represent the true value of the contract at the time of its expropriation. The Supreme Court held that the claimant was entitled to recover the value of the agreement taken over by the United States Government as of the time of taking. Mr. Justice Butler, at page 123, said:

> "By the taking, the claimant lost and the United States obtained the right to have the completed ship delivered to it on or before February 1, 1918, upon payment of the installments remaining to be paid under the contract. It is settled by the decisions of this Court that just compensation is the value of the property taken at the time of the taking. Vogelstein & Co. v. United States, 262 U. S. 337, 340, 43 Sup. Ct. 564, 67 L. Ed. 1012; United States v. New River Colleries, 262 U. S. 341, 344, 43 Sup. Ct. 565, 67 L. Ed. 1014; Seaboard Air Line Ry. v. United States, 261 U. S. 299, 306, 43 Sup. Ct. 354, 67 L. Ed. 664; Monongahela Navigation Co. v. United States, 148 U. S. 312, 341, 13 Sup. Ct. 622, 37 L. Ed. 463."

Accord:

Seaboard Air Line Ry. v. *United States,* 261 U. S. 299 (1923);

United States v. *North American Co.,* 253 U. S. 330 (1920);

United States v. *Pacific Railroad,* 120 U. S. 227 (1887).

Whenever private property is taken to facilitate the exercise of the power to regulate inter-state commerce just compensation must be made to the former owner and holder of such property.

United States v. *Cress*, 243 U. S. 316 (1916). This action was brought in the District Court to recover compensation for the taking of land and water rights resulting from the construction and maintenance by the Federal Government of certain locks and dams on the Cumberland and Kentucky Rivers in aid of navigation upon those rivers. It was held that the Federal Government had power to improve navigable streams in the exercise of the power to regulate inter-state and foreign commerce, but that such exercise when private property is taken is in subordination to the Fifth Amendment. To this effect is the language of Mr. Justice Pitney at pages 319 and 326:

> "The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders both navigable and non-navigable, and the ownership of the lands forming their beds and banks (Barney v. Keokuk, 94 U. S. 324, 338; Packer v. Bird, 137 U. S. 661, 671; Hardin v. Jordan, 140 U. S. 371, 382; Shively v. Bowlby, 152 U. S. 1, 40, 58; St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners, 168 U. S. 349, 358), subject, however, in the case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations (Shively v. Bowlby, 152 U. S. 1, 40; Gibson v. United States, 166 U. S. 269, 272; Scott v. Lattig, 227 U. S. 229, 243); the exercise of this authority being subject, in its turn, to the inhibition of the Fifth Amendment against the taking of private property for public use without just compensation. * * *
>
> "But the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power, like others, must be exercised, when private property is taken, in subordination to the Fifth Amendment."

United States v. *Lynah,* 188 U. S. 445 (1903), was an action to recover from the United States compensation for certain real estate which was taken and appropriated purportedly under the exercise by the Government of its power of eminent domain and the regulation of interstate commerce. The United States by the construction of a dam flooded lands belonging to the claimant so as totally to destroy their value. The Supreme Court held that this was the taking of private property within the scope of the Fifth Amendment and that just compensation must be paid by the Government to the previous property owner. Mr. Justice Brewer, who wrote the opinion for the Court, discussed the point as follows at pages 464 and 471:

> "The rule deducible from these cases is that when the government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates. It is earnestly contended in argument that the government had a right to appropriate this property. This may be conceded, but there is a vast difference between a proprietary and a governmental right. When the government owns property, or claims to own it, it deals with it as owner and by virtue of its ownership, and if an officer of the government takes possession of property under the claim that it belongs to the government (when in fact it does not) that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the government to pay for that which it claims to own. Very different from this proprietary right of the government in respect to property which it owns is its governmental right to appropriate the property of individuals. All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The government may take personal or real property whenever its necessities or the exigencies of the occasion demand. So the contention that the government had a paramount right to appropriate this property may be conceded, but the Constitution in the Fifth Amendment guarantees that when this governmental right of appropriation—this asserted paramount

right— is exercised it shall be attended by compensation.

"The government may take real estate for a post office, a court house, a fortification or a highway; or in time of war it may take merchant vessels and make them a part of its naval force. But can this be done without an obligation to pay for the value of that which is so taken and appropriated? Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others. * * *

"Passing to the third question, it is contended that what was done by the government was done in improving the navigability of a navigable river, that it is given by the Constitution full control over such improvements, and that if in doing any work therefor injury results to riparian proprietors or others it is an injury which is purely consequential, and for which the government is not liable. But if any one proposition can be considered as settled by the decisions of this Court it is that, although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation."

Accord:

Monongahela Navigation Co. v. *United States*, 148 U. S. 312 (*supra*, p. 10).

2. *Horowitz* v. *United States*, 267 U. S. 458, *is not in point.*

The *Horowitz* case went to the Supreme Court on appeal from a judgment of the Court of Claims dismissing the petition upon a demurrer.

The petition alleged a contract with a Department of the United States to ship certain silk prior to March 4, 1920, and sought consequential damages for breach thereof. The petition further alleged that said failure to ship was caused by an embargo placed by the Railroad Administration on shipments of silk by freight. Neither the validity of the

embargo nor its effect in delaying the shipment was challenged by the petition.

The claimant had previously contracted to sell the silk to a silk company in New York. When the silk failed to arrive in New York by early shipment, the New York purchaser refused to carry out his purchase contract so that when the silk eventually arrived in New York on or about March 12, the consignee refused to accept delivery.

In this case, the government was not attempting to retain the silk for its own use or to cancel the contract.

The holding was that the United States is not liable for consequential damages resulting from breach of contract arising out of a proper exercise of a paramount power. It does not hold that the United States could have requisitioned the claimant's silk then in the possession of the United States for its own use without making payment of just compensation or that it could have cancelled the contract so as to retain the ownership and use of the silk without making just compensation. The impact of the embargo fell upon all contracts alike. The fact that the government was also a contractor and that its contract was affected along with all others was fortuitous. There is a fundamental distinction between a suit for consequential damages for breach of contract where no property is taken for public use and a suit for compensation for cancellation of contract or for the taking of property. Cases illustrating such distinction are discussed *supra*. The instant case seeks just compensation for cancellation of contract and taking of property—factors not present in the *Horowitz* case.

3. *Ling Su Fan* v. *United States*, 218 U. S. 302 (1910), *is not in point.*

Philippine law No. 1411 provided, among other things, that the exportation from the Philippine Islands of Philippine silver coins coined by authority of the Act of Congress of March 2, 1903, was prohibited. The plaintiff in error, in

violation of this statute, exported certain Philippine coined silver and was convicted for the same. In sustaining the conviction and affirming the judgment of the Supreme Court of the Philippine Islands, the United States Supreme Court, through Mr. Justice Lurton said, at page 310:

> "Conceding the title of the owner of such coins, yet there is attached to such ownership those limitations which public policy may require by reason of their quality as a legal tender and as a medium of exchange. These limitations are due to the fact that public law gives to such coinage a value which does not attach as a mere consequence of intrinsic value. Their quality as a legal tender is an attribute of law aside from their bullion value. They bear, therefore, the impress of sovereign power which fixes value and authorizes their use in exchange. As an incident, the Government may punish defacement and mutilation and constitute any such act, when fraudulently done, a misdemeanor. Rev. Stat., §§ 5459, 5189."

The United States Supreme Court recognized that title to the coins was vested in the owner thereof. It further recognized that the coins had a certain bullion value aside from their quality of legal tender. The Court's holding in no way affects the question at bar for it was no broader than a holding that the sovereign might properly prevent exportation of the coin of the realm. There was no attempt to take over the property for the use of the Philippine Government; the statute merely regulated the use of coin as currency. The decision cannot in any way be interpreted as a holding that the sovereign could divest the holder of the title to his coin and take it over to itself without making proper and just compensation therefor.

II.

An owner and holder of gold certificates described in the certified questions to whom redemption has been refused and who has been compelled to surrender said certificates may sue in the Court of Claims.

A. The Court of Claims Has Jurisdiction of This Case as an Action for Compensation for Cancellation of Contract.

Section 145 of Judicial Code (U. S. Code Section 250) provides in part as follows:

> "The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> (1) *Claims against United States.* First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable * * *."

Discussion, *supra*, under I-B 1., page 15, demonstrates that the certificates are express contracts and hence suits thereon for compensation for cancellation are expressly allowed by the above quoted statute which confers jurisdiction upon the Court of Claims.

Accord:

> *Russell Motor Car Co.* v. *United States*, 261 U. S. 514, *supra*, page 18.

B. The Court of Claims Has Jurisdiction of This Case as an Action for Compensation for Expropriation of the Certificates or the Gold Represented by the Certificates.

The rule is well established that where property is taken pursuant to an act of Congress for public use, the Government is under an implied obligation to make just compensation to the owner. In the instant case, property belonging to private individuals to which admittedly the Government claimed no title was taken for an alleged public purpose. Said property was in the form of contracts and in the form of gold itself held for the claimant.

The owner's claim for compensation is one arising out of an implied contract within the meaning of the statute defining the jurisdiction of the Court of Claims, whether or not there has been any formal procedure for the condemnation of the property so taken. This rule was clearly stated by Mr. Justice Harlan in *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645 (Appealed from Court of Claims 1884), at page 656, as follows:

> "In that view, we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the government of the United States.'"

Brooks-Scanlon Corporation v. *United States*, 265 U. S. 106, *supra*, page 23, was an action in the Court of Claims to recover a balance alleged to be due as compensation for

the taking by the Government of the plaintiff's rights under a contract for the construction of a ship. It was held by the Supreme Court that the Court of Claims properly assumed jurisdiction of this matter.

Russian Volunteer Fleet v. *United States*, 282 U. S. 481 (Court of Claims 1931), was an action against the United States in the Court of Claims to recover just compensation for the requisition of contracts for the construction of two vessels. The Court of Claims dismissed the petition for want of jurisdiction. 68 Ct. Cls. 32. The Supreme Court issued a writ of certiorari. The Supreme Court reversed the judgment of the Court of Claims and held that such case properly fell within Section 145 of the Judicial Code giving to the Court of Claims jurisdiction over said suit. Mr. Chief Justice Hughes said at page 490:

> "Section 24, paragraph 20, of the Judicial Code, U. S. C. Tit. 28 § 41, subd. (20), gives jurisdiction to the District Courts of the United States, concurrent with the Court of Claims, of claims against the United States not exceeding $10,000, founded upon the Constitution, or any law of Congress, or upon any contract, express or implied, with the Government of the United States, when the claimant would be entitled to redress against the United States in a court of law, equity, or admiralty, if the United States were suable. The case of an alien friend is not excepted. Section 145 of the Judicial Code (U. S. C. Tit. 28, § 250) gives to the Court of Claims jurisdiction of suits on similar claims against the United States without limit of amount. The authority conferred upon the President by the Act of June 15, 1917, was exercised by him through the United States Shipping Board Emergency Fleet Corporation, and as the compensation fixed by that Corporation was not satisfactory to the petitioner, it became entitled under the express terms of the Act to bring suit against the United States to recover the amount justly payable by reason of the requisition."

Accord:

A. W. Duckett & Co., Inc. v. *United States*, 266 U. S. 149 (Appealed from Court of Claims 1924).

III.

There was a taking of property within the meaning of the Fifth Amendment.

A. **Gold Constituting Trust Property Belonging to the Claimant Was Taken by the United States.**

(See I-A, *supra*, pages 5 to 15.)

B. **Property in the Nature of a Contract Belonging to the Claimant Was Taken by the United States.**

(See I-B, *supra*, pages 15 to 17.)

IV.

Each certified question should be answered in the affirmative.

Dated: December 17, 1934.

Respectfully submitted,

GRANDIN TRACY VOUGHT,
Amicus Curiae.

ROY H. CALLAHAN,
Of Counsel.

APPENDIX A.

History of Sections 428 and 429 of the U. S. Code.

Section 5 of the Act of March 3, 1863, entitled "An Act to provide Ways and Means for the Support of the Government" was the first provision for the issuance of certificates against the deposit of gold coin or gold bullion. It provided as follows:

> "SEC. 5. AND BE IT FURTHER ENACTED, That the Secretary of the Treasury is hereby authorized to receive deposits of gold coin and bullion with the treasurer or any assistant-treasurer of the United States, in sums not less than twenty dollars, and to issue certificates therefor, in denominations of not less than twenty dollars each, corresponding with the denominations of the United States notes. The coin and bullion deposited for or representing the certificates of deposit shall be retained in the treasury for the payment of the same on demand. And certificates representing coin in the treasury may be issued in payment of interest on the public debt, which certificates, together with those issued for coin and bullion deposited, shall not at any time exceed twenty per centum beyond the amount of coin and bullion in the treasury; and the certificates for coin or bullion in the treasury shall be received at par in payment for duties on imports."

Section 12 of the Act of July 12, 1882, entitled "An Act to enable national-banking associations to extend their corporate existence, and for other purposes," contained a separate provision for the issuance of gold certificates against the deposit of gold coin as follows:

> "SEC. 12. That the Secretary of the Treasury is authorized and directed to receive deposits of gold coin with the Treasurer or Assistant Treasurers of the United States, in sums not less than twenty dollars, and to issue certificates therefor in denominations of not less than

twenty dollars each, corresponding with the denomination of United States notes. The coin deposited for or representing the certificates of deposits shall be retained in the Treasury for the payment of the same on demand. Said certificates shall be receivable for customs, taxes, and all public dues, and when so received may be reissued; * * *"

This Act of July 12, 1882 apparently supersedes the Act of March 3, 1863 in so far as the former related to the issuance of gold certificates against the deposit of gold coin.

The substance of Section 6 of the Act of July 12, 1882 was readopted as Section 6 of the Act of March 14, 1900, entitled "An Act to define and fix the standard of value, to maintain the parity of all forms of money issued or coined by the United States, to refund the public debt, and for other purposes." Said section reads in part as follows:

"SEC. 6. That the Secretary of the Treasury is hereby authorized and directed to receive deposits of gold coin with the Treasurer or any Assistant Treasurer of the United States in sums of not less than twenty dollars, and to issue gold certificates therefor in denominations of not less than twenty dollars and the coin so deposited shall be retained in the Treasury and held for the payment of such certificates on demand, and used for no other purpose. Such certificates shall be receivable for customs, taxes, and all public dues, and when so received may be reissued, and when held by any national banking association may be counted as a part of its lawful reserve: * * *"

Section 6 of the Act of March 14, 1900, *supra,* was amended by the Act of March 4, 1907, entitled "An Act to amend the national banking Act, and for other purposes." The portion of Section 6 of the Act of March 14, 1900 above quoted was amended to read as follows:

"SEC. 6. That the Secretary of the Treasury is hereby authorized and directed to receive deposits of gold coin with the Treasurer, or any Assistant Treasurer of the United States in sums of not less than twenty dollars,

and to issue gold certificates therefor in denominations of not less than ten dollars, and the coin so deposited shall be retained in the Treasury and held for the payment of such certificates on demand, and used for no other purpose. Such certificates shall be receivable for customs, taxes, and all public dues, and when so received may be reissued, and when held by any national banking association may be counted as a part of its lawful reserve: * * *"

Section 6 of the Act of March 14, 1900 as amended by the Act of March 4, 1907, was again amended by the Act of March 2, 1911. The first portion of said section, after the amendment of 1911, reads as follows:

"SEC. 6. That the Secretary of the Treasury is hereby authorized and directed to receive deposits of gold coin with the Treasurer, or any Assistant Treasurer of the United States, in sums of not less than twenty dollars, and to issue gold certificates therefor in denominations of not less than ten dollars, and the coin so deposited shall be retained in the Treasury and held for the payment of such certificates on demand, and used for no other purpose. Such certificates shall be receivable for customs, taxes, and all public dues, and when so received may be reissued, and when held by any nationl banking association may be counted as a part of its lawful reserve: * * *"